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No. 98-652

In The

Supreme Court of the United States

October Term, 1998

SOUTHWESTERN BELL COMMUNICATIONS, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE TEXAS JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

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MOTION OF TEXAS JUSTICE FOUNDATION, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

TO THE HONORABLE COURT:

COMES NOW, TEXAS JUSTICE FOUNDATION (TJF) and files this Motion for Leave to File Brief as Amicus Curiae.

The TEXAS JUSTICE FOUNDATION ("TJF") is a 501(c)(3) charitable non-profit law firm that has as its mission the protection, in the public interest, of private property rights and the free enterprise system against unconstitutional government interference or exercise of government power in an inordinate and unreasonable manner, thus limiting government to its appropriate role in society.

Accordingly, the Texas Justice Foundation involves itself in cases that it considers to be landmark, or potentially landmark, in an effort to accomplish that mission. In keeping with its mission, the Texas Justice Foundation files this amicus brief because of its interest in ensuring that Texas' consumers reap the benefits of full competition in the long distance telephone market, as well as in the local calling market. Full competition means lower costs for telephone service to Texas' consumers. With full competition in both markets, consumers in Texas will have more choices to select the kind of telephone service they want.

A party may seek leave of this Court to file a brief as amicus curiae on issues raised by the case. Rule 37.2(b). Because of the significance and importance of this case, the number of interested parties is quite large. The following have consented to the filing of this Amicus Brief: Association for Local Telecommunications Services,

AT&T, MCI, Bell Atlantic Corporation, National Cable Television Association, Southwestern Bell Communications, and Sprint Communications Company, L.P. While not expressly objecting, the following parties have not responded to the Texas Justice Foundation's request for consent: The U.S. Department of Justice on behalf of Federal Communications Commission, Competitive Telecommunications Association, Keith Maydak, and Telecommunications Resellers Association. The Texas Justice Foundation did attempt to reach all parties in writing or by telephone. The TEXAS JUSTICE FOUNDATION possesses the requisite interest in the outcome of this case and TEXAS JUSTICE FOUNDATION's participation will not prejudice any party to this litigation. The TEXAS JUSTICE FOUNDATION filed an Amicus Brief before the Trial Judge and the Fifth Circuit Court of Appeals in this case without opposition by any party.

The TEXAS JUSTICE FOUNDATION, therefore moves this Court for leave to file a brief as Amicus Curiae, and asks this Court to accept for filing the attached Brief of Amicus Curiae TEXAS JUSTICE FOUNDATION, Inc. in Support of the Petition for Writ of Certiorari on this the 19 day of November, 1998.

Respectfully submitted,

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Texas Justice Foundation ("TJF") is a Texas 501(c)(3) charitable non-profit litigation and education foundation that has as its mission the protection, in the public interest, of fundamental economic liberty, private property rights, and the free enterprise system against unconstitutional government interference or exercise of government power in an inordinate and unreasonable manner, thus limiting government to its appropriate role in society.[1]

Accordingly, the Texas Justice Foundation involves itself in cases that it considers to be landmark, or potentially landmark, in an effort to accomplish that mission. In keeping with its mission, the Texas Justice Foundation files this amicus brief because of its interest in insuring that Texas' consumers reap the benefits of full competition in the long distance telephone market, as well as in the local calling market. Full competition means lower costs for telephone service to Texas' consumers. With full competition in both markets, consumers in Texas will have more choices to select the kind of telephone service they want.

In placing an unlawful burden on Bell Operating Companies, Congress has needlessly harmed consumers and frustrated national public policies of competition,

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity other than the Amici Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

liberty, and the principle of nondiscrimination in the marketplace.

The interest of the public at large will be significantly impacted for good or ill by the outcome of this case, and the costs to the public will be enormous if the plaintiffs are not allowed to compete in the relevant markets. It is the interest of the people which should be paramount in the administration of justice, as Abraham Lincoln stated on that great battlefield that "government of the people, by the people and for the people" should continue and prosper in the world. Texas Justice Foundation's interests, and the interests of the public, will thus be significantly affected by the outcome of this appeal.

REASONS FOR GRANTING THE PETITION

I. THE CASE RAISES FUNDAMENTAL QUESTIONS ABOUT THE STRUCTURE OF "OUR FEDERALISM" IN THE CONTEXT OF CONGRESSIONAL USURPATION OF JUDICIAL AUTHORITY IN AN "UNUSUALLY IMPORTANT LEGISLATIVE ENACTMENT"

The Fifth Circuit's opinion creates and amplifies a prophylactic exception that would essentially eviscerate the Bill of Attainder clause of the Constitution. If the Fifth Circuit's decision is allowed to stand, Congress may feel free to cave in to political pressure and special interests and pass more legislation that is not general, but allows some individuals to participate in some markets, but not others. The pressure of lobbying and political influence peddling would become irresistibly intense. The Bill of

Attainder clause is designed as a simple, easy to apply bar against such abuse.

The Bill of Attainder clause has not seen extensive litigation, just as the prohibition against quartering troops in homes has not. Until the Fifth Circuit's decision below, both were clearly prohibited by the Constitution. If this case is not taken, Congress will be emboldened to succumb to the temptations that produced this Bill of Attainder. Instead of market freedom and competitive pressure, with a level playing field, open to all, determining who is successful, we will have legislatures determining the market winners and losers.

Thomas Jefferson wrote in a letter to James Madison on the 20th of December, 1787, that:

> "A Bill of Rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inference."

In his *Collection of Essays, No. III*, in 1788, Noah Webster wrote:

> "A Bill of Rights against the encroachment of an elective legislature, that is, against our *own* encroachments on *ourselves*, is a curiosity in government." (emphasis in original)

Like the Bill of Rights, the prohibition of Bills of Attainder was intended to protect ourselves from ourselves. The founding fathers sought, by the separation of powers into executive, legislative, and judicial departments, and by the adoption of the Constitution and Bill of Rights, to prohibit all excessive concentrations of power

in any one function of government, even to the protection of ourselves from ourselves.

At the time of the American Revolution, and for some centuries prior to that time, the Parliament of Great Britain had utilized Acts of that body which imposed penalties, even the death penalty, on subjects of the Crown. Article 1, Section 9, Clause 3 of the U.S. Constitution forbids the federal government from passing Bills of Attainder and Ex Post Facto Laws or impairing the obligations of contracts. Article I, Section 10, Clause 1 impose the same prohibition on the states.

Such enactments violate principles deeply embedded in our constitutional structure. The Constitution separates the judicial power from the legislative power. *See City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). Legislative bodies are supposed to enact general rules, applicable to all persons or certain classes of people, which grant rights to them or impose duties on them. It is the function of the judicial branch to decide, *under due process procedures containing safeguards*, including the rules of procedure and evidence, whether a specific person or corporation is entitled to a right, or subject to a duty, or penalty established by the legislature. Bills of Attainder are contrary to these principles. They inflict legislative punishment ignoring judicial methods of proof designed to insure fairness in fact-finding. The history of Bills of Attainder has also shown that their passage was often induced by popular passion or motivated by unproved suspicions or special interests.

Likewise, in this case, Congress has selected specifically by name 20 corporate persons, no more, no less,

and imposed upon them restrictions on their freedoms of liberty, association, speech and enterprise that are imposed on no other corporations in the United States. Such an enactment is a Bill of Attainder and should be, for the reasons and based upon the authorities set forth below, declared by the Court to be Unconstitutional and Void.

The Texas Justice Foundation agrees with the Petitioners, SBC Communications, Inc., et al., that §§ 271-275 of the Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56 (1966), are unconstitutional.

Telecommunications Act §§ 271-275, entitled "Special Statutory Provisions Concerning Bell Operating Companies," prohibit specifically named companies and, in particular, the largest phone company in Texas, and no others, from engaging in certain businesses and forms of speech. By their express terms, the "Special Statutory Provisions" prohibit the named Bell Operating Companies from competing in enormously important markets: long-distance services, equipment manufacturing, and electronic publishing.

Congress simply does not have the authority to single out a handful of named companies and punish them alone because of a legislative judgment about the merits of a prior lawsuit, or because of their potential to break the law in some remote future. While Congress has the broad power to enact rules of general application, the Legislature has no authority to sit as judge and jury over individual companies. Congress ignored that foundational precept in drafting the Special Statutory Provisions and, in so doing, violated the Bill of Attainder Clause.

The "Special Statutory Provisions" are hurting America's consumers and economy by suppressing competition, and such a public policy consideration is of enormous significance.

These detrimental consequences are unconstitutional and should be overturned.

A. THE ACT VIOLATES THE BILL OF ATTAINDER CLAUSE

The 1996 Telecommunications Act's (the "Act") "Special Statutory Provisions" are modeled after certain restrictions placed on the Bell Operating Companies by a consent decree in *United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131, (D.D.C. 1982), aff'd sub nom., *Maryland v. United States*, 460 U.S. 1001 (1983).

The consent decree required the American Telegraph and Telephone Co. ("AT&T") to divest its 20 Bell Operating Companies and prohibited those companies from engaging in certain lines of business. The decree provided that the Bell Operating Companies could not provide interchange (via long-distance) services, manufacture telecommunications equipment, offer information services (including electronic publishing), or many other products or services. *Id.* 552 F. Supp. at 227. Under the terms of the decree, a Bell company could petition the "AT&T" district court to lift the restrictions, and the district court often exercised its authority to grant such waivers.

The "Act" completely overhauled federal telecommunications regulation and, in so doing, eliminated the decree's restrictions and obligations. In effect, the "Act"

usurped the Court's role and eliminated restrictions to local exchange competition. Furthermore, the "Act" stripped the Bell companies of any monopoly position and reimposed many of the consent decree line-of-business restrictions in the form of the "Special Statutory Provisions."

In these provisions, Congress singled out the Bell Operating Companies, alone and by name, for a series of special burdens not applicable to any other incumbent local exchange carrier. Section 271 of the "Act" prohibits the named companies from offering consumers long-distance service where the company offers local exchange service; § 273 prohibits the same companies from manufacturing and providing telecommunications equipment to consumers; § 274 bans the companies from providing consumers electronic publishing materials; and § 275 prohibits the companies from providing consumers alarm-monitoring services. In each case, the Bell Operating Companies may not serve consumers in the specified line of business for a period of years, or until certain conditions precedent are met, to the satisfaction of the government. In essence, the parties that were once reporting to the Court after a trial and agreed settlement are now reporting to the executive branch by congressional fiat regarding provisions to which they had not agreed.

The Bill of Attainder Clause of the United States Constitution broadly protects private persons from punitive legislative measures imposed without judicial process. *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder . . . shall be passed."). The clause forbids Congress from passing "a law that legislatively determines

guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977); *See also United States v. Brown*, 381 U.S. 437 (1965).

The Supreme Court has recently rearticulated the importance of the structural division of power in our Constitution as a protection of fundamental individual liberties in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1264 (1995). While *Lopez* did not specifically deal with Bills of Attainder, *Lopez* did deal with the fundamental, structural, separation of powers that reflects the same limitation of power embodied in the Bill of Attainder provision. *Lopez* states:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. *See U.S. Const. Art. 1, § 8.* As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the

> Federal Government will reduce the risk of tyranny and abuse from either front." *Ibid.* 514 U.S. 549, 552, 115 S.Ct. 1624, 1626.

The Fifth Circuit's judicially created prophylactic exception to the Bill of Attainder prohibition is just as susceptible to expansion (and thus abuse of individual liberty) as the Government's commerce clause argument in *Lopez*, supra. This is an individual liberty case which is just as important as any free speech or other case of fundamental liberty. But the Government's argument of a prophylactic effect would always apply to any Bill of Attainder and instead of limiting government power as the Framers intended, it would in fact allow unlimited expansion of government and destruction of individual liberty. Economic freedom is as important as free speech and just as valuable in many ways.

The Court's reasoning in *Lopez* is just as applicable to this case:

> "We pause to consider the implications of the Government's arguments. The Government admits, under its 'costs of crime' [read prophylactic] reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime [read anticompetitive behavior], regardless of how tenuously they relate to interstate commerce. See Tr. of Oral Arg. 8-9. Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to

> perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." 514 U.S. 549, 564, 115 S.Ct. 1624, 1631.

The Court must be active in protecting those rights which are specifically in the Constitution, such as freedom from Bill of Attainders, not creating new rights. The right not to be singled out for punishment by the legislature is clearly and expressly guaranteed in the Bill of Attainder clause. This means that there must be judicially enforced limits on the powers of Congress, no matter that this introduces some uncertainty. As *Lopez* says:

> "The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. See U.S. CONST., Art I, § 8. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty "to say what the law is." *Marbury v. Madison*, 1 Cranch. 137, 177, 2 L.Ed. 60 (1803) (Marshall, C.J.). Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers." 514 U.S. 549, 566, 115 S.Ct. 1264, 1633.

1. The "Act" Violates the Bill of Attainder Clause Because It Selectively Bars Private Parties from Pursuing Their Chosen Professions.

Since the ratification of the Constitution, the most common variety of unconstitutional Bill of Attainder has been that which prohibited private parties from pursuing employment in the industry of their choice. *See Brown*, 381 U.S. 437 (forbidding members of the Communist Party from serving as officers or nonclerical employees of labor unions); *United States v. Lovett*, 328 U.S. 303 (preventing three named individuals from being paid for federal employment); *Ex parte Garland*: 71 U.S. (4 Wall.) 333 (1867) (barring those who had served with the Confederacy from legal practice in federal court); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (barring those who had served with the Confederacy from working as priests).

The "Act", essentially a shopping list of prohibitions forbidding the named local telephone exchange companies from conducting various businesses, demonstrates in vivid detail why the Constitution does and should reserve the authority to punish to the judicial branch of the government, rather than to its political branches. Some of the prohibitions (47 U.S.C. §§ 271, 273) replicate in some manner the prohibitions of the AT&T consent decree: some (47 U.S.C. § 274) track in part restrictions removed from the decree years ago; and others (47 U.S.C. §§ 275, 276) bear no relationship to anything other than the ability of lobbyists to convince the legislature of the merits of their particular claims. The purported rationale of all of these restrictions remains unitary – to allay

suspicions that the named local telephone exchange companies would not comply with the provisions of the Act that require them to open their local networks to competition (47 U.S.C. §§ 251, 252).

If this suspicion were all that is required for Congress to allocate markets and market shares or proscribe certain lines of business for companies, then of what relative value are the antitrust laws? For example, Congress could simply order Microsoft not to enter a web browser market and give it to Sun Microsystems or Netscape. Congress could tell General Motors not to produce Corvettes and allow Ford and Chrysler to be the only producers of sports cars, specifically Mustangs and Vipers. After all, Microsoft is so big it "might be" violating the antitrust laws, and General Motors likewise.

The prohibitions of the 1996 Telecommunications Statute, while constitutional in the exercise of judicial power, with its attendant rights to counsel, compelling witnesses and jury trial, are unconstitutional prohibitions in a legislative decree. Given the absurdity of the above examples, it is clear why legislation like this is an abuse of congressional authority.

2. The Special Provisions Punish the Bell Operating Companies

The primary inquiry in determining whether a constraint qualifies as punishment for these purposes is historical – whether it is the type of sanction that has traditionally been understood to fall within that category. *See, e.g., Nixon,* 433 U.S. at 473-75. In this context, that inquiry is an easy one. For well over a hundred years, the

Supreme Court has held that disabilities of the very kind at issue here – prohibitions on individuals or groups engaging in a specific business or profession – constitute punishment. Indeed, "legislative enactment[s] barring designated individuals or groups from participation in specified employments or vocations have been a primary focus of the Bill of Attainder Clause." *Id.* at 474.

Other cases emphasize this same, crucial point. *See Selective Service System*, 468 U.S. at 852 ("the list of punishments forbidden by the Bill of Attainder Clause . . . include[s] legislative bars to participation by individuals or groups in specific employments or professions"); *Brown*, 381 U.S. at 448 ("Disqualification from the pursuits of a lawful avocation" constitutes punishment) (quoting *Cummings*, 71 U.S. at 320); *Lovett*, 328 U.S. at 316 (permanent bar on government employment "is punishment, and of a most severe type"). As the Court explained long ago, "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct . . . All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder." *Garland*, 71 U.S. at 377.

The clarity and significance of these precedents is violated by the Fifth Circuit's decision below. The kind of restriction imposed here – preventing Southwestern Bell, Pacific Bell, Nevada Bell, and the other Bell Operating Companies from pursuing billions of dollars worth of lawful business opportunities – has historically been understood to constitute punishment that may not be

imposed on entities that Congress has singled out by name without a judicial trial.

3. The Act Punishes the BOC's by Restating Prior Punishment

If the Bill of Attainder Clause does not apply where Congress restates prior judicial punishment, or it has some "prophylactic" purpose, then such a rule would be inconsistent with the purpose of the clause: "[T]he Bill of Attainder Clause . . . reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States v. Brown*, 381 U.S. at 445. Nothing in the history of the clause suggests that Congress is more at liberty to punish after the judiciary has acted than before. *See id.* at 442-46 (reviewing history and early application of clause). Trial by legislature is unconstitutional even if it merely restates a sentence. It would be clearly unconstitutional for Congress to pass a law sentencing a named individual to a sentence of 15 years with a special parole term of 15 years because a judge had previously sentenced the same person to 12 years and 12 years of special parole. In the instant case, while the Court still had jurisdiction, it could alter the judgment; Congress cannot merely substitute itself for sentencing or supervising judges. Such action seriously jeopardizes the distinctive role of the courts in the constitutional framework.

The provisions do not channel behavior, but rather rest on a congressional finding of future guilt based on an

unstated finding of past taint. Such activity is adjudication. "Under our Constitution,. . . . [however,] the task of adjudication must be left to other tribunals." *Brown*, 381 U.S. at 461. The proper remedy for a hypothetical failure by a BOC to comply with antitrust laws is enforcement action by the executive before the judicial branch – not the peremptory imposition of punishment by Congress. Congress simply took the case away from the courts, and while Congress does have the power to establish the jurisdiction of the courts, it may not do so with a prospective finding of guilt.

The Act denies the affected Companies the right to employment of their choice, a punishment traditionally judged to be prohibited. The Act serves no other purpose. It is designed solely to reach that particular end. The Act was clearly motivated by a desire to punish. The Act violates the Bill of Attainder Clause.

II. THE FIFTH CIRCUIT'S DECISION DESTROYS FREE MARKETS AND NEEDLESSLY HURTS TEXAS CONSUMERS

Congress established, and the divided Fifth Circuit panel has now upheld, in the "Special Statutory Provisions," a set of anti-competitive prohibitions and restraints on Bell Operating Companies' entry into new markets, in some cases even going beyond the conditions imposed by the consent decree of the Court. Instead of creating a "single set of rules for" the Bell Operating Companies and their competitors, Congress targeted the "Special Statutory Provisions" only at the Bell companies.

Restrictions such as those in the "Special Statutory Provisions" carry heavy social costs in terms of job growth, the economy, and consumer benefits, which this Court must protect. This Court is the ultimate protector of economic liberty under our Constitution. That role cannot be abdicated without great peril. Deference to the Congress is not appropriate where they have clearly singled out companies by name for adverse consequences. Finally, relief from the line-of-business restrictions will benefit consumers by producing lower rates, higher quality, and more choice in telecommunications. Quoting from the Trial Brief of the Communications Workers of America at p. 9:

> " 'CWA' estimates that allowing the Bell Companies into markets now foreclosed by the Special Statutory Provisions will result in price declines of 22% on average for all telecommunications services. That means consumers will save $63 billion per year on telephone and cable bills, freeing that amount of income for the purchase of other products and services."

A significant portion of those savings would be to Texas consumers. Again, quoting from the Communication Workers of America Brief at p. 10:

> "The long-distance markets have brought great rewards, stating that the recent successes of SNET and GTE in attracting customers for their long distance services illustrates the ability of local carriers to garner a significant share of the long distance market. Rapidly, SNET and GTE have captured market share in their regions through aggressive price competition that has directly benefited consumers. Professor Jerry Hausman has estimated that SNET's overall

> rates average 18% lower than AT&T's overall rates (including AT&T's discount plans) and that GTE's average 17% lower. Other parts of the country will enjoy similar savings when the Bell Operating Companies are allowed to provide long-distance service."

The Bell Operating Companies were singled out by name, rather than on all companies exhibiting general characteristics. Congress made plain that those provisions are based on a legislative judgment as to those entities – as to their alleged past behavior or propensity for misconduct in the future – and not on any judgment regarding a generic problem that needed to be addressed by legislation. The Special Statutory Provisions thus were not intended to, and in fact do not, serve a legitimate federal objective. Rather, they act as unconstitutional punishment of certain named companies.

The unconstitutionality of the "Special Statutory Provisions" requires, we respectfully submit, that the Court affirm the decision of the trial court and reverse the Fifth Circuit. In the process, the Court will also benefit consumers in Texas with an improved economy, and lower priced, higher quality telecommunications goods and services.

The "Act" is a Bill of Attainder and is therefore unconstitutional. This is a case of national importance.

CONCLUSION

For *the above stated* reasons, as well as those stated by the Petitioners, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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